

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0049011105

FLOYD COMES AT NIGHT,)	Case No. 1948-2005
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
GLACIER PARK, INC.,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Charging party Floyd Comes At Night filed a discrimination complaint with the Montana Department of Labor and Industry on June 15, 2004. He alleged that respondent Glacier Park, Inc., discriminated against him on the basis of race (Native American) and age (68 years old) by denying him (a) an opportunity to be laundry chemical certified over a 2-week period by the previous manager, Eugene Betch and (b) the positions of manager and assistant manager of the laundry department on or about May 12, 2004, and retaliated against him for helping the laundry workers negotiate a \$1.20 per hour increase in pay beginning with the 2003 season. The Human Rights Bureau's investigation found no merit to the complaint. The Human Rights Commission heard and sustained Comes At Night's objection to dismissal and referred the matter to the Hearings Bureau for contested case hearing.

Hearing examiner Terry Spear convened the in-person contested case hearing in this matter on October 31, 2005. Joe J. McKay represented Comes At Night. Gary L. Davis, Luxan & Murfitt, PLLP, represented GPI. The hearing resumed by telephone and concluded on November 1, 2005 (by agreement of the parties). Floyd Comes At Night, Eugene Betsch (by telephone), Beverly Buckley, Dana Connell, Leon Stiffarm, Albert Lee III (by telephone), Marvin James Comes At Night (by telephone) and Joseph Comes At Night (by telephone) testified. The parties presented telephonic oral arguments on November 3, 2005, and submitted the case for decision.

The parties stipulated to admit exhibits 1-2, 101-111 and 113-121. The hearing examiner admitted exhibit 112, pp. 2-3, over Comes At Night's objections.

II. ISSUES

The issue for this case is whether GPI illegally discriminated against Comes At Night as alleged in his complaint. A full statement of the issues appears in the final prehearing statement.

III. FINDINGS OF FACT

1. Glacier Park, Inc. (GPI), is a corporation that holds the contract to provide concessions within and around Glacier National Park in northern Montana and Canada. GPI operates a number of lodging facilities in the area of the park, and employs seasonal workers for those facilities while they are open, from spring through fall, each year. GPI also has permanent employees to maintain its management and internal business operations and facilities between seasons, as well as to hire seasonal employees and otherwise oversee the operations of the corporation.

2. GPI employed Floyd Comes At Night in its main laundry facility at East Glacier under successive seasonal contracts for several years, through 2003. Over the years, Comes At Night progressed from laundry associate to supervisor to assistant manager within the laundry. He worked as the assistant laundry manager at the East Glacier facility during his last 4 seasons of employment with GPI.

3. GPI does not usually do formal performance evaluations of seasonal employees. GPI management does review the performance of seasonal employees, with the aim of identifying employees they would like to have return the following season and employees they would like to advance within the seasonal work force. GPI management also aims to identify employees whose deficient performance indicates they should not be hired in following seasons.

4. Because GPI recruits approximately 850 seasonal employees to begin work each spring, the primary focus is upon recruitment and retention of seasonal employees. GPI's seasonal work force is about 25% Native Americans, the majority of whom reside in the park area. Some of its full-time employees (who number around 40) are likewise Native American.

5. During the seasons when Comes at Night worked as assistant laundry manager in the East Glacier facility, his performance was monitored by Eugene

Betsch, his immediate supervisor, and by GPI senior management. There were complaints received about Comes At Night's performance, especially when he was acting as the manager, in Betch's absence.

6. Over the years, GPI periodically revised its hiring practices for seasonal employees, always with the aim of recruiting and retaining good seasonal employees as early as possible and as completely as possible. By 2000, GPI had formalized a practice of requiring seasonal help to apply each year—the seasonal jobs were temporary, and none of the seasonal employees (including seasonal management employees like Betsch) had any right to a job in a subsequent season.

7. In 2000, Comes At Night applied for the assistant manager position in early May. GPI sent him a contract for the seasonal job, to sign and return within 10 days. Comes At Night did so and was hired for the job.

8. In September 2000, Comes At Night completed and submitted his application for the assistant manager position for the 2001 season. In early May 2001, GPI sent him a contract for the seasonal job, to sign and return within 10 days. Comes At Night did so and was hired for the job.

9. In late March 2002, Comes At Night completed his application for the assistant manager position for the 2002 season, submitting it to GPI at the beginning of April. In early April, GPI sent him a contract for the seasonal job, to sign and return within 10 days. Comes At Night did so and was hired for the job.

10. In 2002, many of the laundry workers in the East Glacier facility felt they were being paid too low an hourly wage, below that of the housekeeping employees. These laundry workers were predominantly Native American. Comes At Night, because he was a member of management, a seasonal worker and an elder Native American, was a person to whom many of the seasonal laundry workers complained about their pay. Unbeknownst to the laundry workers, GPI management was contemplating increasing the wages for laundry service employees, to keep pace with an increase for housekeeping employees in 2002, so that retention of seasonal workers in the laundry service might improve. Comes At Night tried to arrange a meeting between GPI management and some of the workers. Such a meeting did occur, although not necessarily due to Comes At Night's efforts. Raises in pay for the laundry workers did occur in the 2003 season. GPI management did not think that the raises resulted from Comes At Night's efforts and did not bear him any animosity because the raises were implemented. GPI was unaware of any assertion by Comes At

Night that the lower wages resulted because most of the laundry workers were Native American.

11. In 2003 and 2004, GPI was attempting to hire all of its seasonal employees by April, before the permanent employees moved to the East Glacier offices in May of each year. In furtherance of that goal, GPI held “job fairs” in February through early April, to make the application process readily available to persons living in and around the park. GPI’s policy and practice, known to any prospective employee or past employee who asked about it or read the various application forms and materials, was to hire qualified applicants to fill openings as those applicants appeared. It was thus a “first come, first served” process.

12. On April 9, 2003, Comes At Night completed and submitted his application for the assistant manager position for the 2003 season. The next calendar day GPI sent him a contract for the seasonal job, to sign and return within 10 days. Comes At Night did so and was hired for the job.

13. At the beginning of the 2003 summer season, Betsch told GPI he would retire after that season. Betsch had applied for and been hired by GPI as the seasonal laundry manager for several successive years. Later during the 2003 season, Betsch told GPI that he had decided to return the following year before retiring, but that he wanted an assistant manager with certification in laundry and linen management (which Betsch already had), since 2004 would be his last year.

14. GPI management decided to recruit a new assistant laundry manager for the East Glacier facility in 2004. The new assistant manager would be the “heir apparent” to Betsch, if that new assistant performed satisfactorily in 2004 and timely applied in 2005. To these business-related ends, GPI wanted to follow Betsch’s recommendation and to require that the assistant manager hold either a “CLLM,” (certification in laundry and linen management) or an “RLLD” (registered laundry & linen director), available from such speciality technical schools as the National Association of Institutional Linen Management (Richmond, Kentucky).

15. GPI management found Comes At Night’s deficiencies as the assistant laundry manager more apparent during the 2003 season, a year in which wildfires forced evacuations of some of GPI’s facilities, with the result that unusual burdens fell upon the East Glacier facility, including the laundry. Whether it was Comes At Night’s fault or not, GPI management blamed him for some of the difficulties other services experienced with the laundry service during the 2003 season. Management did not assign this blame because Comes At Night was Native American, because of

his age or because he allegedly had tried to help the laundry workers get a raise, but because he was second in command behind Betsch (who was retiring soon) at the time of the problems.

16. In Fall 2003, GPI management told Comes At Night that his job performance in 2003 was not satisfactory, that the management structure of the laundry would be upgraded, and that he would not qualify for a management position under the new job requirements and qualifications.

17. In December 2003, GPI's Human Resource Department told Comes At Night by telephone that he would not be considered qualified for the assistant laundry manager position at the East Glacier facility unless he possessed the laundry and linen certifications (CLLM or RLLD).

18. Comes At Night made some minimal efforts to identify how he might obtain the certifications, but did not commence any actual program to obtain either of them.

19. In early January 2004, Ray Adams, a Caucasian who had experience in laundry and linen management, applied for the assistant manager position at GPI's East Glacier laundry facility. GPI decided to offer him the job. Adams requested that the offer be delayed a few days (normally, a GPI written offer was open for 10 days from the date it was sent to the applicant, and then was void), because he would be away from his home in Florida for personal business. On January 27, 2004, GPI sent him a contract for the seasonal job, to sign and return within 10 days. Adams did so and was hired for the job.

20. Betsch changed his mind again, deciding not to return to GPI during the 2004 season. Subsequent to the hiring of Adams, he advised GPI management that he would not be applying for the laundry manager position that year after all. GPI management, concerned about its ability to recruit both a new laundry manager and a new laundry assistant manager with certifications, decided to open 2 supervisor positions in lieu of the assistant manager, and offer Adams, the assistant manager it had already hired, the manager position.

21. On March 11, 2004, Marvin Comes At Night, one of Comes At Night's adult children, completed and submitted an application for work in the GPI laundry facility at East Glacier during the 2004 season. Marvin Comes At Night had worked as a shift supervisor, under the supervision of his father and Betsch, the previous 3 seasons. On March 17, 2004, GPI sent him a contract for a seasonal laundry

supervisor job, to sign and return within 10 days. Marvin Comes At Night did so and was hired for the job.

22. On April 21, 2004, Julian Trussell completed and submitted an application for work with GPI during the 2004 season. Trussell, who had retired with extensive management experience, had no prior work history with GPI. On April 27, 2004, GPI sent him a contract for a seasonal laundry supervisor job, to sign and return within 10 days. Trussell did so and was hired for the job.

23. The original contracts sent to the 2 supervisors specified that Trussell would receive \$7.00 per hour in wages and Marvin Comes At Night would receive \$5.80 per hour in wages for the same job. This was a mistake that GPI corrected later in the season. Both supervisors were ultimately paid \$7.00 per hour.

24. On April 22, 2004, Comes At Night completed and submitted his application for seasonal work with GPI for the 2004 season. On May 6, 2004, GPI sent him a contract for a seasonal laundry associate job, to sign and return within 10 days. Comes At Night did so and was hired for the job.

25. Comes At Night was unhappy with what he viewed as a demotion. He did not accept either explanation proffered by GPI—that his application was too late under the “first come, first served” policy and practice or that he lacked the necessary qualifications for the laundry manager job. He filed the present Human Rights complaint, alleging race discrimination and retaliation.

IV. OPINION¹

Montana law prohibits employment discrimination because of race and age, Mont. Code Ann. § 49-2-303(1)(a), and also prohibits retaliation against an individual for engaging in protected activity. Mont. Code Ann. § 49-2-301; *Mahan v. Farmers Union Cent. Exch., Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58.

¹ Statements of fact in this opinion are hereby incorporated by reference to supplement the fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

A. Comes At Night Did Not Establish a Prima Facie Case of Race Discrimination

The prohibitions of the Montana Human Rights Act mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Where there is no direct evidence of discrimination, Montana courts have applied 3-tiered burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212-13; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032; *Martinez v. Yellowstone County Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246.

McDonnell Douglas applies to assure that plaintiffs, such as Comes At Night, can have their day in court “despite the unavailability of direct evidence.” *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 121, **quoted in** *Laudert v. Richland County Sheriff’s Office*, ¶ 22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386; **see also** *Martinez at* 245-46 (observing that one of the purposes of the *McDonnell Douglas* test is to ease the difficulty of bringing a claim of employment discrimination in the absence of direct evidence).

The *McDonnell Douglas* “burden-shifting approach” applies because this case involves circumstantial rather than direct evidence of unlawful discrimination (also know as a “pretext” case). *See, Laudert, supra at* ¶20. Comes At Night could not produce any credible direct evidence that GPI management took adverse employment action against him because he was Native American.²

The *McDonnell Douglas* standard has three parts:

- (1) Comes At Night must establish a prima facie case of discrimination;

² Counsel for Comes At Night made commendable efforts to establish such direct evidence. In addition to confronting GPI management witnesses about the discrepancy in pay in the contracts sent to Trussell and Marvin Comes At Night, he presented testimony that Trussell and/or Adams left before Comes At Night during the 2004 season and that GPI did not offer Comes At Night their jobs for the balance of the season. He also attacked the credibility of the management witnesses at every opportunity. Ultimately, the evidence upon which he necessarily relied was too weak, too confusing and simply not sufficiently credible to give rise to findings of direct evidence of bias on the part of GPI.

(2) if he makes such a showing, the burden shifts to GPI to produce a legitimate, nondiscriminatory reason for its actions; and

(3) if GPI makes such a showing, Comes At Night may show, by a preponderance of the evidence, that the legitimate reasons offered are only a pretext for discrimination.

Vortex Fishing Systems, Inc. v. Foss, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

The elements of a prima facie case (the first tier) depend on the facts of the case. *Vortex Fishing Systems* at ¶ 16. Comes At Night must show that (1) he is a member of a protected class (in this instance, Native American); (2) he was qualified for employment as the assistant manager (or a supervisor) at the time that he applied and (3) his application was rejected and GPI sought to fill or filled the position with others similarly qualified except for race. *Id.* and Admin. R. Mont. 24.9.610(2)(a).³

Comes At Night is Native American. Thus, he met the first element of his prima facie case. With regard to the second and third elements, at the time Comes At Night applied, only one supervisor position was unfilled, and there was already an applicant with better qualifications for that job. Before Comes At Night applied, GPI had already hired an assistant manager, Ray Adams. When Betsch decided not to return, GPI promoted Adams to manager and eliminated the assistant manager job in favor of 2 supervisor positions. Adams was already the manager, Marvin Comes At Night had already accepted a supervisor position, and Julian Trussell had already applied for the other supervisor position before Comes At Night presented an application for seasonal work.

GPI did not offer Trussell the supervisor job until after Comes At Night applied for it. Had they been equally qualified, “first come, first served” could have been a legitimate tie-breaker, but they were not. GPI no longer considered Comes At Night qualified to work again as a supervisor, because of its perception (untainted by racial bias) of his 2003 performance. Trussell had a history of management

³ *Cf. also, Martinez supra*, 626 P.2d at 246 *citing Crawford v. West. Electric Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

experience. Comes At Night had a history of management experience with GPI that was not entirely successful, and that had been unsatisfactory in 2003.

Comes At Night failed to establish that he was a qualified applicant at the time he applied and failed to establish that his application was rejected in favor of another equally qualified applicant because of race. Trussell applied first and had unblemished credentials as far as GPI knew. Comes At Night applied later and GPI management was not happy with his 2003 performance. With no credible evidence to make a circumstantial link between either the timing of the 2 applications or the dissatisfaction with Comes At Night's 2003 performance and Comes At Night's race, there is no inference of discriminatory motivation in the hiring of Trussell.

When satisfied with prior performance, GPI encouraged a seasonal employee to apply for a new season. If that employee indicated an interest in returning, GPI might expect to receive a new application. In precisely this fashion, GPI expected Betsch to return as laundry manager in 2004, and hired Adams as assistant manager based upon that expectation. There is no evidence of record of GPI refusing a more qualified applicant for a position in anticipation of receiving an application from a person who satisfactorily performed a particular seasonal job the previous year. The most that can be said is that until Betsch changed his mind about applying again in 2004, GPI had not specifically advertised the laundry manager position. In this limited sense, "first come, first serve" was not always strictly applied to all seasonal hiring decisions.

Comes At Night was not accorded the same treatment as Betsch in early 2004, and he had no expectation of such treatment. In his testimony, Comes At Night admitted that GPI, while hiring for any of the seasons, "could have" hired someone else for his job, before he applied. He had no reasonable basis to believe that GPI, in 2004 or in any other year, was holding his job (or even a job) for him until he applied. He had no reasonable basis to believe that GPI was not specifically advertising the assistant laundry manager position in 2004, in anticipation of his application. The evidence does not establish that GPI denied that treatment to Comes At Night because of his race. Betsch was a highly qualified laundry manager. GPI wanted him back for another season while it found a new manager and made the transition to a new management team in the laundry. While still expecting Betsch back, GPI gave Comes At Night dual notice that he would not likely be selected for a management season the following year. Again, none of GPI's actions appear to result from racial bias.

Finally, there was no credible evidence that GPI ever denied to Comes At Night, because of his race, an opportunity to be laundry chemical certified over a 2-week period by Betch, the previous manager.

Comes At Night failed to establish his prima facie case of race discrimination in employment.

B. Comes At Night Did Not Establish a Prima Facie Case of Age Discrimination

Essentially the same analysis applies here, as in section “A” above, substituting age for race as the protected class to which Comes At Night belongs.

Comes At Night must show that (1) he is a member of a protected class (in this instance, he was, at hearing, 68 years old); (2) he was qualified for employment as the assistant manager (or a supervisor) at the time that he applied and (3) his application was rejected and GPI sought to fill or filled the position with others similarly qualified except younger than Comes At Night.

Comes At Night met the first element of his prima facie case. With regard to the second and third elements, at the time Comes At Night applied, only one supervisor position was unfilled, and there was already an applicant with better qualifications for that job. Before Comes At Night applied, GPI had already hired an assistant manager, Adams. When Betsch decided not to return, GPI promoted Adams to manager and eliminated the assistant manager job in favor of 2 supervisor positions. Adams was already the manager, Marvin Comes At Night had already accepted a supervisor position, and Julian Trussell had already applied for the other supervisor position before Comes At Night applied for seasonal work.

GPI did not offer Trussell the supervisor job until after Comes At Night applied for it, and the same analysis applies here as applied for the claim of race discrimination. Trussell had a history of management experience, which was stronger than Comes At Night’s blemished history of management experience with GPI.

Just as in the analysis of his race discrimination claim, Comes At Night failed to establish that he was a qualified applicant at the time he applied and failed to establish that his application was rejected in favor of another equally qualified applicant because of age.

With regard to his age discrimination claim, Comes At Night was not accorded the same treatment as Betsch in early 2004, and he had no expectation of such treatment. In his testimony, Comes At Night admitted that GPI, while hiring for any of the seasons, “could have” hired someone else for his job, before he applied. He had no reasonable basis to believe that GPI, in 2004 or in any other year, was holding his job (or even a job) for him until he applied. The evidence likewise does not establish that GPI denied such treatment to Comes At Night because of his age. To the extent Betsch received more favorable treatment in 2004 (as discussed in detail in the race discrimination analysis), it was based upon his qualifications and not his age (which in any event was not younger than Comes At Night’s age).

Finally, there was no credible evidence that GPI ever denied to Comes At Night, because of his age, an opportunity to be laundry chemical certified over a 2-week period by Betch, the previous manager.

Comes At Night failed to establish his prima facie case of age discrimination in employment.

C. Comes At Night Did Not Establish a Prima Facie Case of Retaliation

To establish his prima facie case of unlawful retaliation for opposition to illegal discrimination, in violation of Mont. Code Ann. § 49-2-301, Comes At Night must prove that: (1) he acted (with the knowledge of GPI) to oppose illegal discrimination; (2) GPI subjected him to significant adverse acts and (3) there was a causal connection between GPI’s significant adverse acts and his opposition to illegal discrimination. Admin. R. Mont. 24.9.603(1) and 24.9.610⁴; *Beaver v. Montana D.N.R.C.* (2003), ¶ 71, 2003 MT 287, 318 Mont. 35, 8 P.3d 857; *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 835 P.2d 720, 726-27, **citing** *Holien v. Sears Roebuck* (Or. 1984), 689 P.2d 1292; *Schmasow v. Headstart* (June 26, 1992), HRC Case #8801003948; **accord**, *Laib v. Long Construction Co.* (August 1984), HRC Case #ReAE80-1252, **quoting** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793.⁵

Clearly GPI took adverse employment action against Comes At Night—he was not hired in 2004 at the same level as he was in 2003. This was adverse to him—he made less money and had less authority in 2004. Clearly, GPI had no legal obligation to rehire him as assistant manager (had it actually had an assistant laundry manager in 2004), but it nonetheless took adverse action in hiring him to a lower

⁴ Both regulations apply to this case. Admin. R. Mont 24.9.107(1)(b).

⁵ This, again, is the first tier of the 3-tier *McDonnell Douglas* indirect evidence analysis.

position. Comes At Night proved the second element of his prima facie case of retaliation.

With regard to the first element of his prima facie case, the evidence that Comes At Night took action to oppose illegal discrimination is virtually nonexistent. There was some testimony that laundry associates who were Native American were unhappy with lower pay than housekeeping employees (many of whom were also Native American). There was likewise some testimony that some of the laundry associates perceived Comes At Night to be responsible for a meeting with GPI management to discuss their pay and a possible raise. There was no evidence that GPI management considered Comes At Night to have anything to do with either the eventual pay raise for the laundry workers or any efforts to oppose the lower pay on any protected class basis (presumably race) prior to the pay raise.

Since Comes At Night did not prove he engaged in opposition to illegal discrimination known to GPI, there is no possible causal connection between the actual adverse action GPI took and any alleged opposition to illegal discrimination. GPI could not under any circumstances have taken adverse action against Comes At Night because of something he did of which GPI had no knowledge. Comes At Night could not prove the third element of his prima facie case.

Therefore, Comes At Night failed to prove a prima facie case of retaliation.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. GPI did not take adverse employment action against Comes At Night in 2004, by reason of his race, his age or in retaliation for his alleged opposition to illegal discrimination. Mont. Code Ann. §§ 49-2-301 and 49-2-303(1)(a).
3. GPI did not engage in the discriminatory practices alleged by Comes At Night and the complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

1. The department grants judgment against charging party, **Floyd Comes At Night**, and in favor of respondent, **Glacier Park, Inc.**, on the allegations of illegal discrimination because of race and illegal retaliation.

2. The department dismisses the complaint.

DATED: January 4, 2006.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Hearings Bureau, Montana Department of Labor and Industry